APPENDIX

APPENDIX A

[Filed July 17, 1969]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION No. 4464

ERNEST PERKINS, ET ALS., *Plaintiffs*,

v.

L. S. MATTHEWS, ET ALS., *Defendants*.

Before COLEMAN, Circuit Judge, COX, Chief District Judge, and NIXON, District Judge.

COLEMAN, Circuit Judge.

1. THE CONTROVERSY.

Twelve days prior to the date prescribed by law for the holding of Democratic municipal primaries throughout Mississippi, the plaintiffs filed their suit in the District Court. They complained that in 1966 and 1968 the City of Canton, Mississippi, had extended its municipal boundaries, that this caused a large number of white voters to be included in the City, and that this diluted the effectiveness of the vote of newly enfranchised black citizens. It was said that this, in the absence of a submission to the United States Attorney General or a declaratory judgment from the United States District Court for the District of Columbia, was a failure to comply with 42 U.S.C. § 1973c, the Voting Rights Act of 1965.[1]

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[1] Enacted August 6, 1965, applicable to changes with respect to any voting qualifications, standard practice, or procedure different to that in force on November 1, 1964.

The complaint also lodged a similar attack against the re-location of polling places within the four wards of the City of Canton.

May 8, 1969, pursuant to a hearing, Judge Nixon granted a temporary restraining order enjoining the holding of the municipal primaries scheduled for May 13 pending the disposition of the case on the merits. No election has been held and the encumbents are holding over in their respective offices, as provided by Mississippi law.

May 15, 1969, the Chief Judge of this Circuit constituted a Three-Judge Court composed of Judges Coleman, Cox, and Nixon.

By leave of the Court, May 30, 1969, the plaintiffs added a third count. This alleged that prior to 1969 four members of the Board of Aldermen in the City of Canton were elected by wards. The complaint acknowledged that in 1962, prior to the enactment of the Voting Rights Act of 1965, the Mississippi Legislature enacted a general statute, amending existing law, to provide that Aldermen in all municipalities of less than ten thousand population shall be elected by a vote of the entire electorate of the municipality, each required to reside in the ward which he proposed to represent on the town council.[2] It was alleged as a fact, which is the fact, that Canton did not comply with this law in the municipal elections of 1965, but followed the old statute, that is, the four aldermen were elected by wards.

In 1969, Canton proposed to comply with the 1962 statute. Plaintiffs say that this would be a change from the procedure in effect on November 1, 1964, and was thus invalid until either submitted to the Attorney General or to the United States District Court for the District of Columbia, as in other cases.

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[2] Chapter 537, Laws of Mississippi of 1962, Mississippi Code of 1942, § 3374-36.

2. The Decision.

We have heard this case on stipulations of the parties, exhibits, and oral testimony adduced in open court. We find and hold that under the facts of this case the contentions of the plaintiffs are not well taken, that the temporary injunction should be dissolved, and the qualified electors of the City of Canton should be free to hold an election in compliance with the 1962 statute.

3. The Facts.

Canton had a population of 9,707 at the last federal census. Approximately 5,900 are registered to vote in municipal elections.

Based on an average index of two voters per residence, which the plaintiffs do not challenge, the 1965 expansion of the Canton city limits brought into the City 46 black voters and no white voters. Plaintiffs do not attack this expansion. The 1966 expansion brought in 28 black voters and 64 white voters. The 1968 expansion brought in 8 black voters and 112 white voters. The sum total of the voters brought within the city limits by the three extensions would be 82 black voters and 176 white voters, or a majority of 94 white voters among those annexed in all three expansions.

One of the plaintiffs, who was a candidate for Mayor in the Democratic primary scheduled for May 13 [which office would have been voted upon city at large in any event] testified that as of January 12, 1969, there were 2052 white voters in Canton and 2794 black voters, a majority of 742 black. He further testified that between January 12 and February 3 approximately 800 white voters registered in the city and only 150 black voters registered. It is to be noted that the figure of 800 new white registrants as contrasted to only 150 black registrants was not supported by documentary evidence but represented the wit-

ness's best judgment after an observation of the registration books. If there were 800 new white registrants after January 12 only 176 could have come from the annexed areas, even if all had waited until then to register. In any event all the witnesses agreed that regardless of the 94 net gain in the white vote, brought about by the expansions, the majority of the electorate in the City of Canton are black.

4. Conclusions of Law on the Applicability of the Act to the Expansions.

We are therefore confronted with the question: Did Congress intend (in the affected states) to freeze municipalities to their existing boundaries, prohibiting any municipal expansion even though, as in this case, the annexations included a white majority of 94 in a total voting population of 6,000, not destroying a black majority?

We have been cited nothing to show that Congress either thought of such or intended it. Applying the full reach of the Act, Congress could not have intended such a result unless it were shown to be a stratagem deliberately designed to overturn a black majority at the municipal polls. In Canton, Mississippi, the black voters still had a majority of not less than 600 after the expansions were effected. It is significant that the first expansion brought in 46 black voters and no white voters at all. Moreover, the City has expended over three quarters of a million dollars bringing municipal services to the annexed area, including the all-black annexation of 1965.

We therefore hold that these annexations were not violative of the Voting Rights Act of 1965.[3]

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[3] Under Mississippi Law, municipalities may neither expand nor contract their corporate limits at their unfettered discretion. To do either they must petition the Chancery Court, where any party in interest may object and litigate his objections. Mississippi Code 1942, § 3374-10, et seq.

5. Compliance With the Municipal Election Law of 1962.

On March 26, 1962, the Supreme Court decided Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L. Ed. 2d 663. On May 24, 1962, the Mississippi Legislature, by and with the approval of the Governor, enacted Chapter 537 of the Laws of Mississippi of 1962, entitled "AN ACT providing for the city-wide election of all individuals comprising the governing authority of any municipality". The Act amended the previously existing § 3374-36, Mississippi Code of 1942 and concluded with the following language, not heretofore in the statute:

> "All aldermen shall be selected by vote of the entire electorate of the municipality. Those municipalities which determine to select one alderman from each ward shall select one of the candidates for alderman from each particular ward by a majority vote of the entire electorate of the municipality".

Plaintiffs do not attack the validity of this amendment. They say it should not be observed in Canton in 1969 because it was not observed in 1965.

This enactment preceded the Voters Rights Act of 1965 by a little over three years. It permitted the requirement that an alderman should reside in the ward he proposes to represent, but the choice is left to all the voters in the municipality, each having an equal voice in the selection of the governing authorities of the city. This complies with the Constitutional requirement of one man—one vote, Dusch v. Davis, 387 U.S. 112, 87 S.Ct. 1554, 18 L.Ed. 2d 656 (1967).

We have previously pointed out that in the municipal elections of 1965 Canton did not comply with the 1962 law. The reasons for non-compliance are not shown. In any event, plaintiffs wish to continue the invalid 1965 pro-

cedure of allowing each ward to elect its alderman for the reason that in one ward Negro citizens are in the overwhelming majority, leaving them in the position, if they wished, of voting on racial considerations alone and thus having at least one Negro on the City Board.

If race alone is to govern the outcome of elections as well as the official acts of city legislative bodies, it is obvious that if the procedure desired by the plaintiffs were approved then the one Negro member of the Board would always be outvoted by the four white members. His presence on the City Board would, in practical effect, amount to nothing beyond the presence of a black man who could always cast his dissenting vote. Since a majority of the voters in Canton are black it is equally true that under the 1962 Act the black voters have the power, if they wish to be influenced by race alone to elect an all black governing body.

We do not think, however, that this issue is to be decided by these considerations.

In the first place, the City of Canton should obey the one man—one vote rule. In the second, the 1962 Act antedates the Voting Rights Act of 1965, and could not have been enacted for the purpose of thwarting the latter. In the third, it is axiomatic that a violation of the law in the elections of 1965 does not justify continued violations. The City should comply with the law in 1969, regardless of whether it complied in 1965. Indeed, non-compliance in 1969 would invalidate the election if a challenge were to be raised. We are not impressed with the argument that Congress intended to freeze unlawful election procedures. Unlawful election procedure, insofar as the Fifteenth Amendment applies, is what the Act intends to stop. Moreover, the state statute requiring that aldermen be elected by all the voters of the municipality, instead of from individual wards, brings cities in compliance with the one man —one vote rule, leaving to all the inhabitants an equal

voice in the election of their municipal officials, something which Congress could not abrogate without a Constitutional Amendment.

We are therefore of the opinion that the contentions of the plaintiffs on this issue are not due to be sutsained.

6. The Change in Polling Places.

We find no merit in the attack upon the changes made in the location of the polling places. The evidence on this issue is undisputed. The same number of polling places will remain in each city ward. No voter will have to go outside his ward to vote. The changes were made necessary because one place did not have space for voting machines, two others had to be moved because they had been situated on private property (bank lobbies) and permission to use the space had been withdrawn, and another was moved out of the courthouse to a school building because facilities were more ample and the move eliminated any interference with sessions of the various courts sitting at the courthouse.

This opinion constitutes our findings of fact and conclusions of law in this case, Rule 52(a), Federal Rules of Civil Procedure.

Judgment may be entered by any Judge of the Court, for the Court, dissolving the temporary injunction and dismissing the complaint.

This July 17th, 1969.

s/ Jas. P. Coleman
United States Circuit Judge

s/ Harold Cox
United States Chief District Judge

s/ Walter L. Nixon, Jr.
United States District Judge

APPENDIX B

[Filed May 12, 1969]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NUMBER 4464

ERNEST PERKINS, ET AL., *Plaintiffs.*

v.

L. S. MATTHEWS, ET AL., *Defendants.*

Oral Opinion of the Court

This is an action brought by Plaintiffs who are all Negroes and candidates for City offices in the City of Canton, Mississippi, against the Mayor and Board of Aldermen of the City of Canton, the Democratic Municipal Executive Committee of the City of Canton and the Municipal Election Commission of the City of Canton, Mississippi, based on 42 U.S.C. Section 1973(C) and 1983 for declaratory and injunctive relief against the Defendants' 1966 and 1968 extensions of the Municipal Boundaries of the City of Canton, Mississippi, to include a substantial number of additional, as alleged, white voters and against Defendants' selection of polling places for the May and June 1969 Municipal Primary and General Elections, on the grounds that the boundary extension and the selection of polling places each is a change in practice and procedure with respect to voting in a political subdivision covered by 42 U.S.C. Section 1963 B(a) [sic: § 1973b(a)] and may not be enforced with 42 U.S.C. 1973 C and on grounds that the boundary extension and the selection of polling places deny or abridge Plaintiffs' right to vote and have their vote counted in violation of the Fourteenth and Fifteenth Amendments to the Constitution of the United States. Jurisdiction of this Court is based on 28 U.S.C. Sections 1343 (3, 4), Sec-

tion 1973C and Section 2201. Three Judge Court has been requested as required by 42 U.S.C. 1973C and this request has been sent by this Court to the Chief Judge of the Court of Appeals for the Fifth Circuit asking that a three judge court be designated to hear this matter, that is, the declaratory judgment and injunctive features thereof. This Court today is hearing this motion for temporary restraining order which was filed and noticed by the Plaintiffs or Petitioners herein, and the only question before this court at this time is whether or not irreparable injury would be caused Plaintiffs if the temporary restraining order were not issued pending the hearing of this matter before a Three Judge Court as required by law and as set forth in the recent case of Allen v. State Board of Elections, Et al., which was decided by the unanimous United States Supreme Court through Chief Justice Earl Warren on March 3, 1969, which was a case that emanated from the State of Mississippi and which involved, among other things, the county-wide voting for all members of boards of supervisors in various counties as authorized by the Mississippi Legislature and which changed the office of the election commissioners for each county from an appointive to an elective office, and also dealt with absentee voting.

The Court, having heard testimony and arguments of counsel and having considered the pleadings and exhibits and all other evidence in this case finds that it has jurisdiction of this matter for determining the question of temporary restraining order and finds that the City of Canton in 1966 and in 1968 extended its municipal boundaries to include additional areas with additional voters residing therein, and finds that there is no proof that these extensions were enacted or put into effect by the City of Canton for the purpose of denying anyone any voting right or to deny anyone any right guaranteed by the Fourteenth and Fifteenth Amendment of the United States Constitution, however the case of Allen versus State Board of Elections held that it is not the function or prerogative

of this Court, even if it were now sitting as a three judge court, to determine the motive of the City in extending its boundary. The only questions to be decided by this three judge court in the final analysis, the three judge court to be designated, is whether or not the State of Mississippi or any of its political subdivisions have acted in such a way as to cause or constitute a voting qualification or prerequisite to voting or standard, practice or procedure with respect to voting within the meaning of Section 5 of the Voting Rights Act of 1965, which changed the situation that existed as of November 1, 1964, and whether or not prior to doing as the City had filed a request for declaratory judgment with the United States District Court for the District of Columbia or asked for approval of the Attorney General of the United States as required by Section 1973. It is stipulated that the City did not take either one of this actions, therefore the only questions before this court at this particular time are whether or not the extension of the boundary of the City of Canton, Mississippi, constituted an act or enactment which changed or affected the voting qualifications or prerequisite to voting or standard, practice or procedure with respect to voting within the meaning of Section 5 of the Voting Rights Act of 1965. And if the Court finds this to be the case, that is, the three judge court to be designated, then in that event it will have no alternative but to grant the relief requested, in part at least.

The Court finds that the extension of the boundaries of the City of Canton, a political subdivision of the State of Mississippi, was such an action to be comparable to the authorization by legislative enactment of the State of Mississippi, of county wide voting on boards of supervisors within certain counties which has been held by the United States Supreme Court to constitute the prohibited action of Section 5 of the Voting Rights Act of 1965.

Therefore the Court finds and is of the opinion that extension of the boundaries of the City of Canton, Missis-

sippi were such enactments or actions which did affect or change the standard practice or procedure with respect to voting that existed on November 1, 1964 in the City of Canton, Mississippi.

The Court further finds that at least one the Plaintiffs or Petitioners, namely, Ernest Perkins, is a candidate in the Democratic Primate for alderman for Ward Three of the City of Canton, and that the other plaintiffs are independent candidates who would be affected at least indirectly through the results, or by the results of the Democratic Primary which would select their opponents in the General Election. Ernest Perkins would be directly affected by the holding of said Democratic Primary elections on this coming Tuesday, May 13, 1969.

The Court therefore finds that Section 1973 of 42 U.S.C. were not complied with and therefore, under Section 5 of the Voting Rights Act of 1965, that there was a change in the standard, practice or procedure as set forth therein without the approval of the Attorney General nor the United States District Court for the District of Columbia. However, this matter is to be finally determined by the three judge court and this court does not purport to substitute its judgment at this time for the three judge court nor to speak finally with respect to this court's opinion on this matter, but does find that there is such a question present and such a probability that the three judge court would so find that to deny a temporary restraining order at this time would cause irreparable harm and injury, not only to Plaintiffs but to other candidates in said election, to the electorate or qualified voters.

This court finds that Plaintiffs are not entitled to the relief requested with respect to enjoining or temporarily restraining of the Democratic Primary by prohibiting those in the newly annexed areas from voting and allowing the primary election to be held through the casting of ballots by only qualified electors residing within the City of Canton, November 1, 1964. It is impossible to deter-

mine at this late date, and incidentally the Court notes that this complaint and motion for temporary restraining order were not filed until May 1, 1969 and noticed for hearing on this date, and the Court has given to the Plaintiffs speedy hearing on the date that they requested, namely, today May 9th, 1969, that to give the Plaintiffs the relief that they requested as just previously stated would result in chaos, confusion, probable election contests and other legal action on the part of those who would be deprived and prevented from voting, particularly if the three judge court designated to hear this case decides that there was no violation of Section 5 or any change in the standard, practice or procedure with respect to voting within the meaning of Section 5 of the Voting Rights Act of 1965.

Therefore, it is the opinion of this court that the Democratic Municipal Election that was to be held in the City of Canton, Mississippi on May 13, 1969 will be enjoined in toto provided the Plaintiffs post a bond as required by law in the amount of $2,500.00, in view of the testimony given herein concerning the costs of advertisements, supplies, rental of voting machines by the City of Canton from Madison County.

Counsel for the Plaintiffs will prepare this order granting this temporary restraining order on this basis provided said bond is posted as required by law and by this order and will submit it to the attorney for Defendants for approval as to form and present this order to the Court on Monday, May 12, 1969.

In the absence of the posing of the required bond, the Motion for Temporary Restraining Order will be overruled and denied.

The above and foregoing Opinion delivered in open court at the conclusion of the hearing on the above referred to Motion on May 8, 1969, and hereby ordered to be made a part of the record in this cause.

/s/ WALTER L. NIXON, JR.
United States District Judge.